(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DON SLOAN, also known as Donald Jay Conrad,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the District Court's denial of Petitioner's motion to suppress because the seizure and search conducted by the Kleberg County Sheriff's Officer violated the Fourth Amendment to the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, from which this appeal is taken, is unreported, and appears as Appendix A ("App. A") hereto. The district court opinion, which is also unreported, appears at App. B hereto.

STATEMENT OF JURISDICTION

This is an appeal of the denial of a motion to suppress and verdict rendered by the District Court and its subsequent affirmance by the United States Court of Appeals for the Fifth Circuit. The District Court denied Petitioner's Motion to Suppress on March 29, 1999, and rendered its verdict on July 21, 1999. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's denial of the motion to suppress on March 17, 2000, and denied Petitioner's Petition for Rehearing En Banc on May 4, 2000. (App. C).

Jurisdiction of this case was proper in the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV — Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Texas Transportation Code § 545.060(a)

§ 545.060. Driving on Roadway Laned for Traffic

(a) An operator on a roadway divided into two or more clearly marked lanes for traffic:

(1) shall drive as nearly as practical entirely within a single lane; and

(2) may not move from the lane unless that movement can be made safely.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

Don Sloan ("Sloan") was arrested on February 9, 1999, for possession of 13 kilograms of cocaine with the intent to distribute. R. Vol. 1, docket sheet at 3. RX Tab 1[1]. Sloan was charged by indictment with knowingly and intentionally possessing cocaine with intent to distribute a controlled substance, that is more than five (5) kilograms of cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). R. Vol. 1 at 62. RX Tab 3.

Sloan filed a motion to suppress on March 18, 1999. R. Vol. 1 at 44-48. RX Tab 5. On March 22, 1999, Sloan filed his brief in support of Defendant's motion to suppress. R. Vol. 1 at 41-43. RX Tab 6. The Government filed its response to Defendant's motion to suppress on March 23, 1999. R. Vol. 1 at 36-40. RX Tab 6. On March 25, 1999, Sloan filed his rebuttal brief. R. Vol. 1 at 34-35. RX Tab 8.

On March 26, 1999, the District Court held a hearing on Sloan's motion to suppress and heard testimony from the arresting officer and Sloan. R. Vol. 3. At the conclusion of the hearing, the District Court, on the record, denied Sloan's motion to suppress. R. Vol. 3 at 69-72. On March 29, 1999, the District Court entered a written order denying the motion to suppress. R. Vol. 1 at 30. RX Tab 9.

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1. References to the record will be designated "R. Vol." followed by the volume number and page number of the record. Where the referenced record is included in the record excerpts, the relevant record excerpt will be identified by "RX" followed by the tab number of the document.

On May 5, 1999, Sloan filed his waiver of jury. R. Vol. 1 at 20. The District Court held a bench trial on May 5, 1999, and found Sloan guilty. R. Vol. 5 at 14. The District Court entered its verdict on May 16, 1999, and the verdict was filed by the clerk of the court on May 18, 1999. R. Vol. 1 at 17. RX Tab 4. Additionally, on May 18, 1999, the District Court entered Additional Findings in Support of Order Denying Motion to Suppress. R. Vol. 1 at 13-16. RX Tab 10.

On July 21, 1999, the District Court held a sentencing hearing and sentenced Sloan to 160 months in the custody of the Bureau of Prisons with a five year supervised release term on standard conditions of supervised release. R. Vol. 6 at 18. A notice of appeal was filed on July 29, 1999. R. Vol. 1 at 3. RX Tab 2.

On March 17, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's denial of the motion to suppress and issued its written opinion. The Petitioner timely filed his Petition for Rehearing En Banc which was denied by the United States Court of Appeals for the Fifth Circuit on May 4, 2000.

B. Statement Of Facts

At approximately 7:10 a.m., February 2, 1999, Sloan was driving north on U. S. Highway 77 in Kleberg County, Texas. R. Vol. 3 at 10. U. S. Highway 77 is a four lane divided highway. R. Vol. 3 at 23. At approximately the same time, Kleberg County Deputy Sheriff Augustin Ruiz ("Officer Ruiz"), driving a canine unit, was taking a crossover to turn back northbound. R. Vol 3 at 9-11. While traveling northbound, Officer Ruiz observed Sloan driving a white-

colored vehicle. As Officer Ruiz approached the vehicle driven by Sloan he observed the right two tires of Sloan's vehicle cross over the white fog line onto the improved shoulder of the highway for approximately ten (10) seconds. R. Vol. 3 at 11. After crossing over the fog line, Sloan's vehicle came back into the lane and continued north. *Id.* Officer Ruiz then dropped back so that he could observe Sloan's driving. *Id.* Officer Ruiz observed Sloan for about an eighth of a mile, after which time Sloan again crossed the white fog line, and then came back into the lane. *Id.* Believing that Sloan was falling asleep at the wheel, Officer Ruiz initiated a traffic stop of Sloan's vehicle for failure to drive in a single lane and driving on the improved shoulder of the highway. R. Vol. 3 at 11-12. Officer Ruiz did not observe Sloan violate any other traffic laws. R. Vol. 3 at 22.

Officer Ruiz approached the driver's rear portion of the vehicle, tapped on it, and motioned for Sloan to step out of the vehicle. R. Vol. 3 at 13. Sloan stepped out of the vehicle and Officer Ruiz and Sloan stepped over to the right side of the highway to get away from traffic. *Id.* Officer Ruiz then identified himself to Sloan and asked to see Sloan's driver's license and insurance. Sloan produced a driver's license and registration. *Id.*

After receiving Sloan's driver's license, Officer Ruiz advised Sloan that he had been stopped for failure to drive in a single lane, and asked Sloan if he was asleep or tired. *Id.* Sloan replied that he was sleepy. R. Vol. 3 at 14. Officer Ruiz then went to his patrol vehicle and gave the dispatcher Sloan's driver's license number. *Id.*

Officer Ruiz returned to where Sloan was standing. *Id.* Thereafter, the dispatcher through Officer Ruiz' earpiece,

indicated that the return of the driver's license check was all clear, and that there were no warrants. *Id.* Officer Ruiz told Sloan that his status was clear. *Id.*

After receiving this information from the dispatcher, Officer Ruiz informed Sloan that he would receive a verbal warning. R. Vol. 3 at 27. Officer Ruiz did not inform Sloan that he was free to go. R. Vol. 3 at 26. Officer Ruiz then began to talk to Sloan to find out where he was coming from and to where he was traveling. R. Vol. 3 at 28. Sloan stated that he was coming from Pharr, Texas, where he was visiting his children at a friend's house, and that he was now traveling to Indiana. R. Vol. 3 at 14.

After concluding this questioning, Officer Ruiz told Sloan that part of his job in the highway service is the interdiction of narcotics, stolen property, large sums of money, and stolen weapons. R. Vol. 3 at 16. Officer Ruiz asked Sloan if he had anything illegal in his vehicle, and Sloan replied "Not that I know of." *Id.* Officer Ruiz then asked Sloan for consent to search his vehicle. *Id.* Officer Ruiz did not inform Sloan that he could refuse the request to search the vehicle, nor did Officer Ruiz give Sloan any written documents explaining or discussing Sloan's right to refuse the search request. R. Vol. 3 at 29-31. Sloan verbally authorized Officer Ruiz to search the vehicle with Officer Ruiz' dog. R. Vol. 3 at 28-29.

Officer Ruiz retrieved the canine out of the patrol car and conducted an exterior search of Sloan's vehicle. R. Vol. 3 at 35. During the search the dog alerted on the right fender towards the passenger door. *Id.* After the search, Officer Ruiz advised Sloan of his Miranda rights. R. Vol. 3 at 33. Thereafter, the vehicle and Sloan were transported to the

Kleberg County Sheriff's Department where an additional search revealed approximately 30 pounds of cocaine. R. Vol. 2 at 9. Sloan was placed under arrest at the Kleberg County Sheriff's Department. *Id.*

REASONS FOR GRANTING THE WRIT

A.

NO TRAFFIC VIOLATION OCCURRED

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. The stopping of a vehicle and the detention of its occupants is defined as a "seizure" within the meaning of the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979); *United States v. Shabaz*, 993 F.2d 431, 434 (5th Cir. 1993). Searches and seizures of motorists who are suspected of criminal activity are to be analyzed under the framework established by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *United States v. Shabaz*, 993 F.2d 431, 434 (5th Cir. 1993).

In *United States v. Kelly*, 981 F.2d 1464, 1467 (5th Cir. 1993), the Fifth Circuit Court of Appeals held that in evaluating the legality of investigatory stops, it should consider: (1) whether the officer's action was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.*, citing *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

1. Officer Ruiz' action in stopping Sloan was not justified because no traffic violation occurred.

Officer Ruiz testified at the hearing on the motion to suppress that he stopped Sloan for violating § 545.060 of the Texas Transportation Code. R. Vol. 3 at 31. Thus, in examining the first prong of the *Terry* analysis, it must be determined if indeed a violation of § 545.060 occurred. In performing this analysis, a reviewing court should be guided by the decision in *Hernandez v. The State of Texas*, 983 S.W.2d 867 (Tex. App. - Austin 1998 pet. ref'd), which is a case factually similar to this case. Although, the *Hernandez* case is not binding on this Court, the case is instructive and offers this Court guidance in the proper historical interpretation and application of the statute to motorists under Texas law.

In *Hernandez*, Hernandez was stopped in the early morning hours after a police officer traveling behind Hernandez observed him swerve 18 inches to the left thereby failing to maintain a single-marked lane. After observing Hernandez swerve, the officer initiated a traffic stop and administered field sobriety tests which Hernandez failed. *Hernandez*, 983 S.W.2d at 868. Prior to trial, Hernandez filed a motion to suppress contending that the initial stop was not justified. *Id.* At the hearing on the motion to suppress, the police officer testified that he was concerned for Hernandez' well-being, that the failure to maintain a single-marked lane was a ticketable offense and that this was the only reason he stopped Hernandez. *Hernandez*, 983 S.W.2d at 868-69.

In considering the propriety of the stop, the Texas court of appeals first considered whether Hernandez had violated

§ 545.060[2]. After a detailed discussion of the history and statutory language of the prior and current statute, the court concluded that a violation of § 545.060 occurs only when a vehicle fails to stay within its lane and such movement is not safe or is not made safely. *Hernandez*, 983 S.W.2d 867 at 871-72. Based upon its finding that Hernandez' action was not unsafe, the court concluded that § 545.060 had not been violated, and the court held that the stop made by the officer on suspicion that § 545.060 of the Texas Transportation Code had been violated was not reasonable. The court therefore reversed the trial court's conviction and remanded the case.

If the analysis applied in the *Hernandez* case is employed here, the conclusion is the same — there was not a violation of § 545.060 and there was no reasonable basis for Officer Ruiz' actions. Officer Ruiz testified at the hearing on the

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2. The current applicable provisions of § 545.060 of the Texas Transportation Code provides:

> (a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
>
> (1) shall drive as nearly as practical entirely within a single lane; and
>
> (2) may not move from the lane unless that movement can be made safely.
>
> . . .

See Texas Transportation Code § 545.060(a) (West 1997). A copy of the statute is a part of the Record and may be found at R. Vol. 1 at 43.

motion to suppress that he stopped Sloan for failure to drive in a single lane. R. Vol. 3 at 13. Further, Officer Ruiz testified that Sloan did not cause any accidents. R. Vol. 3 at 43. In fact, Officer Ruiz did not provide any testimony that Sloan acted in an unsafe manner, nor was there any evidence produced by the Government to establish that Sloan violated § 545.060 by acting in an unsafe manner. Because Sloan did not violate § 545.060, no reasonable basis for Officer Ruiz's action of stopping Sloan exists. Consequently, the first prong of the *Terry* test is not met — that is, Officer Ruiz' actions were not justified.

2. Officer Ruiz' questioning and detention of Sloan violated the second prong of *Terry* as the search was not reasonably related to the alleged traffic violation.

In this case, the testimony of Officer Ruiz at the hearing on the motion to suppress establishes that Officer Ruiz' questions and conversation with Sloan after Officer Ruiz' received an "all clear" from the dispatcher regarding Sloan's license violated the second prong of *Terry*. Officer Ruiz testified that after he received the information from the dispatcher through his earpiece that Sloan had no outstanding warrants and that a check of his driver's license was all clear, he told Sloan he was giving him a verbal warning. Officer Ruiz also further testified that at this time Sloan was free to go; however, Officer Ruiz did not communicate this important fact to Sloan. R. Vol. 3 at 15, 26. Instead, Officer Ruiz immediately, during the same conversation, began to question Sloan regarding where he was traveling from, what he had been doing, and where he was going. R. Vol. 3 at 26-28, 33, 39. Indeed, Officer Ruiz testified that after he received word from the dispatcher and returned Sloan's license to him, the detention of Sloan stopped. R. Vol. 3 at 15. This fact is significant because it clearly demonstrates that in Officer's Ruiz' mind the questioning of

Sloan which followed had nothing to do with the alleged traffic violation which at that point in time was resolved.

The Fifth Circuit Court of Appeals spoke with regard to this issue and the second prong of this Court's decision in *Terry* in *United States v. Shabaz*, 993 F.2d 431 (5th Cir. 1993), noting that the reasoning of the Tenth Circuit's holding in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988)[3], was applied in the case of *United States v. Kelly*, 981 F.2d 1464 (5th Cir. 1993). The Fifth Circuit Court of Appeals went on to quote from the opinion in *United States v. Kelly*, 981 F.2d 1464 (5th Cir. 1993) stating as follows:

> "We do not disagree with the Tenth Circuit," said *Kelley*, "that under appropriate circumstances, excessive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment." 981 F.2d at 1470.

Shabaz, 993 F.2d at 436. The opinion in *Shabaz*, stressed that "... detention, not questioning, is the evil at which *Terry*'s second prong is aimed." *Shabaz*, 993 F.2d at 436.

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3. In *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), the Tenth Circuit stated:

> An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid driver's license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by the police for additional questioning, the officer must also have a reasonable suspicion of illegal transactions in drugs or of any other serious crime.

Id. at 1519.

It is exactly this type of "evil" which has taken place in this case. An officer has determined that he will give only a verbal warning for an alleged minor traffic offense and determines in his own mind that the detention is over but does not communicate this crucial fact to the detainee. Instead, the officer begins a line of questioning after the resolution of the first detention, which leads to a second unlawful seizure and search in violation of the Fourth Amendment. As such, Officer Ruiz' actions violate *Terry*'s second prong.

3. The issue of consent.

In its Additional Findings In Support of Order Denying Motion to Suppress (R. Vol 1 at 10), the District Court found that Sloan consented to the search of his vehicle[4]. In order for a consent to be valid, the consent to search must be free and voluntary. *See United States v. Oliver-Bercerril*, 861 F.2d 424, 425 (5th Cir. 1988). In order to evaluate the voluntariness of consent, a court must consider six factors. These are: (1) the voluntariness of defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; and (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. Each of these factors is relevant, but no single factor is dispositive. *See Shabaz,* 993 F.2d at 438.

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4. In the conclusion of its Findings as well as during the latter part of the hearing on the motion to suppress (R. Vol. 3 at 70-71), the District Court states that Sloan's consent operated not to be a consent to search the vehicle, but rather as consent to remain while the search was being conducted.

The District Court's finding of voluntary consent does not consider all of the evidence in this case, and importantly the District Court's findings do not address the fact that Officer Ruiz did not communicate to Sloan that he was free to leave (R. Vol. 3 at 26), or the fact that Sloan told Officer Ruiz that he was tired and sleepy (R. Vol. 3 at 13). These two facts are critical for any analysis regarding the issue of consent for two reasons. First, a person can only waive a known right. Without being informed that he could leave, Sloan was not aware that he was not still under some form of detention. It is a matter of common sense that a motorist would not assume that he or she could leave the scene of traffic stop without being told by the officer that such an action was permissible. The failure of Officer Ruiz to tell Sloan that he was free to go, after the return of the license and prior to Officer Ruiz' questioning is evidence of a presence of coercive police tactics.

Second, because Sloan had indicated that he was tired and sleepy, it is apparent that Sloan's ability to reason and understand his rights were impaired[5]. This is evidence of the defendant's lack of awareness of his right to refuse to consent. As a consequence the District Court's finding that Sloan's consent was free and voluntary in compliance with *United States v. Oliver-Bercerril*, 861 F.2d 424, 425 (5th Cir. 1988), is clearly erroneous and not made in proper application of the legal standard.

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5. Although his testimony was rejected by the District Court, Sloan further testified at the hearing on the motion to suppress that he did not understand that he had the right to refuse consent. R. Vol. 3 at 56.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit erred in affirming the District Court's denial of Sloan's motion to suppress because the initial traffic stop made by Officer Ruiz was not justified. Sloan did not commit any violation of § 545.060 as that statute has been historically interpreted and applied. Consequently, Officer Ruiz' detention of Sloan violated the Fourth Amendment and the first prong of the *Terry* test.

The District Court erred in denying Sloan's motion to suppress because Officer's Ruiz violated Sloan's Fourth Amendment rights when he continued questioning Sloan after the resolution of the alleged traffic violation. Officer Ruiz' actions were inappropriate under the second prong of the *Terry* test and resulted in a second illegal seizure violating Sloan's Fourth Amendment rights.

The District Court erred in finding that Sloan's consent to search his vehicle was voluntary and freely given. The District Court did not consider the facts that Officer Ruiz did not communicate to Sloan that he was free to leave after Sloan was told he would receive a verbal warning for failure to drive in a single lane, that Officer Ruiz failed to advise Sloan either orally or in writing that Sloan could refuse to consent to the search, or that Sloan was sleepy and tired at the time he gave Officer Ruiz consent to search the vehicle. These facts demonstrate that Officer Ruiz employed coercive tactics to secure Sloan's consent and also demonstrate that Sloan was not aware of his right to refuse consent. Based upon the foregoing the United States Court of Appeals for the Fifth Circuit's affirmance of the District Court's denial

of the motion to suppress is not in harmony with this Court's holding in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Petitioner Don Sloan prays that the District Court's order denying the motion to suppress be reversed and the judgment of conviction vacated.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MARCH 17, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40903
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DON SLONE, also known as Donald Jay Conrad,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. C-99-CR-54-1

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

Don Slone appeals from the judgment entered after he was convicted at a bench trial of possessing cocaine with

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the intent to distribute it. Slone challenges only the district court's denial of a motion to suppress evidence that was gathered after a traffic stop. Our review of the record and the parties' arguments convinces us that the district court did not err in denying Slone's motion.

Slone argues that the traffic stop was unjustified. Because the officer observed Slone's vehicle veer twice onto the shoulder of the highway, however, he had reasonable suspicion to believe that Slone had violated § 545.060(a) of the Texas Transportation Code. *See United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995). This is not a situation like *Hernandez v. State*, 983 S.W.2d 867, 871-72 (Tex. App. 1998, pet. ref'd), in which the officer had observed no unsafe movement by the driver. In contrast, the officer who stopped Slone saw him "jerk[ ] back" into his lane after he veered onto the shoulder for a second time.

Slone argues that the officer unreasonably enlarged the scope of the traffic stop. We agree with the district court, though, that the questions asked by the officer were related to the original purpose of the stop and were in no way excessive. *See United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

Slone argues that the district court erred in finding that he had consented to the search of his vehicle. However, the canine sweep of Slone's vehicle was not a search, and it did not implicate the Fourth Amendment. *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993). Once the dog alerted to the presence of narcotics, the officer had probable cause to conduct a search of Slone's vehicle. *Id.* at 1106-07.

Furthermore, Slone has shown no clear error in the district court's conclusion that he voluntarily consented to remain long enough for the officer to conduct the canine sweep. *See Shabazz*, 993 F.2d at 438.

AFFIRMED.

APPENDIX B — ADDITIONAL FINDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION IN SUPPORT OF ORDER DENYING MOTION TO SUPPRESS DATED MAY 17, 1999 AND ENTERED MAY 18, 1999

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. C-99-54

UNITED STATES OF AMERICA

V.

DON SLONE

ADDITIONAL FINDINGS IN SUPPORT OF ORDER DENYING MOTION TO SUPPRESS

On March 18, 1999, defendant moved the Court to suppress and exclude from evidence cocaine taken from his vehicle. The cocaine was discovered after defendant's vehicle was stopped and searched. Defendant argues the stop violated his rights under the Fourth Amendment of the United States Constitution because no probable cause or reasonable suspicion existed to justify the stop. After hearing evidence and argument on this issue, the Court finds the stop was justified because defendant was observed operating his vehicle in apparent violation of the Texas Transportation Code. See *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995). At the hearing, the motion to suppress was denied.

Appendix B

This opinion and findings are entered in support of the Court's order denying defendant's motion.

I. FACTS

On February 2, 1999 at 7:10 a.m., defendant was driving north on U.S. Highway 77 in Jim Wells County, Texas. Department of Public Safety Trooper Augustine Ruiz observed defendant cross out of his traffic lane twice in apparent violation of Texas Transportation Code Section 545.060(a).[1] On the basis of this observation, and considering the time of day, Officer Ruiz suspected defendant might be too tired to operate his vehicle safely.[2] Officer Ruiz conducted a routine traffic stop and inquired about defendant's alertness, point of origin, and intended destination. Defendant provided inconsistent answers to these questions and his manner suggested nervousness and anxiety. When asked whether he was transporting weapons or narcotic drugs, defendant replied, "not to my knowledge." After examining defendant's identification and insurance information, Officer Ruiz decided to issue a verbal warning.

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1. The relevant portion of Texas Transportation Code § 545.060 provides "an operator on a roadway divided into two or more clearly marked lanes for traffic shall drive as nearly as practical within a single lane and may not move from the lane unless that movement can be made safely."

2. Defendant testified he did not cross out of his lane, but admitted he could not see the passenger-side lane demarcation as he drove. The Court finds the account of events offered by Officer Ruiz more credible than defendant's version. Accordingly, the Court finds that defendant crossed out of his lane on the occasion in question.

The encounter lasted five or six minutes. On the basis of defendant's suspicious behavior and responses, Officer Ruiz formulated the reasonable suspicion that defendant was transporting illegal drugs. After issuing a warning, Officer Ruiz asked for and received permission to search defendant's vehicle. With the assistance of a trained canine, Officer Ruiz inspected the exterior of defendant's vehicle. The canine alerted, suggesting a great probability that narcotics were within. A subsequent vehicle search produced the substance alleged to be cocaine.

II. ANALYSIS

Searches and seizures of motorists suspected of criminal activity are to be analyzed under the framework established in *Terry v. Ohio*, 88 S.Ct. 1868 (1968). *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993). In this case, defendant was stopped because Officer Ruiz observed a traffic violation. Under *Terry*, the judicial inquiry into the reasonableness of a search or seizure "is a dual one — whether the officer's action was justified at its inception, and whether [the search] was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 88 S.Ct. 1868, 1879 (1968). Because Officer Ruiz observed a traffic violation, his initial stop of defendant's vehicle was justified. See *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995) (holding that veering onto road's shoulder is arguably a violation of Texas law and a traffic stop on this basis is justified under *Terry*). Officer Ruiz's questions did not violate defendant's constitutional rights since the inquiries were rationally related to the stop's purpose — discovering whether defendant was too exhausted

to drive. See *Shabazz*, 993 F.2d at 436. Nor did this brief detention, which lasted six minutes at most, exceed a traffic stop's lawful duration. *Florida v. Royer*, 103 S.Ct. 1319, 1325 (1983) (holding investigative detention must be temporary and last no longer than necessary to effectuate the stop's purpose); *United States v. Zucco*, 71 F.3d 188, 191 (5th Cir. 1995) (holding questioning which lasted nine minutes incident to a traffic stop was reasonable).

After issuing the warning, Officer Ruiz requested defendant's permission to inspect his vehicle with a drug-sniffing dog.[3] Defendant testified that he agreed verbally. To be valid, consent to search must be free and voluntary. *United States v. Olivier-Becerril*, 861 F.2d 424, 425 (5th Cir. 1988). The government has the burden of proving, by a preponderance of the evidence, that consent was voluntary. *United States v. Yeagin*, 927 F.2d 798, 800 (5th Cir. 1991). To evaluate the voluntariness of consent, the Court looks to six factors: (1) the voluntariness of defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *Shabazz*, 993 F.2d at 438.

After hearing testimony from the defendant and Officer Ruiz, the Court finds defendant was free to leave after the

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3. A dog "sniff" is not a search requiring consent, *United States v. Hernandez*, 976 F.2d 929 (5th Cir. 1992), therefore defendant's permission was only necessary, if at all, because the canine inspection extended the stop's duration.

verbal warning was given and before Officer Ruiz requested permission to inspect defendant's vehicle. No coercive police procedures were employed. Defendant does not dispute that he gave verbal permission for the inspection and otherwise cooperated with Officer Ruiz. Defendant is possessed of sufficient education and intelligence to understand the request. It is unclear whether defendant subjectively believed Officer Ruiz would find anything incriminating. The sole factor weighing against finding the consent voluntary is defendant's testimony that he did not understand his right to refuse consent. In light of defendant's dishonesty, as evidenced by his presentation of a fraudulent document to Officer Ruiz, the Court assigns little weight to defendant's self serving declaration.[4] Even if defendant's testimony were credible, one factor alone is insufficient to outweigh the other considerations. *Shabazz*, 993 F.2d at 438 (holding each factor relevant but no single factor dispositive).

III. CONCLUSION

As found and stated on the record, the Court finds the traffic stop was proper under *Terry* and that defendant consented to remain present while Officer Ruiz and his canine inspected defendant's vehicle. The drug-sniffing dog's alert provided probable cause to search the car's interior. *See United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995). Accordingly, defendant's motion to suppress is denied.

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4. Defendant testified he gave Officer Ruiz an altered driver's license misidentifying defendant as Donald Conrad.

Appendix B

ENTERED this 17 day of May, 1999.

s/ H.W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION DENYING MOTION TO SUPPRESS DATED MARCH 26, 1999 AND ENTERED MARCH 29, 1999

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. C-99-54

UNITED STATES OF AMERICA

V.

DON SLONE

ORDER DENYING MOTION TO SUPPRESS

Defendant's motion to suppress is denied for the reasons stated on the record. The Court will issue a subsequent order explaining these reasons in greater detail.

ORDERED this 26 day of March, 1999.

s/ H.W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 4, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40903

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DON SLONE, also known as Donald Jay Conrad,

Defendant – Appellant.

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

ON PETITION FOR REHEARING EN BANC
(Opinion 3/17/00, 5 Cir., __, __ F.3d __)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active

service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Robert M. Parker
United States Circuit Judge